The Central Law Journal.

ST. LOUIS, SEPTEMBER 18, 1885.

CURRENT EVENTS.

LEGAL OBITUARIES.—The *Cincinnati Law Bulletin* mentions the death of Col. Oscar Fitzallen Moore, of Portsmouth, Ohio, which took place on June 23d, while attending court at Waverly, in that State. He is described as one of the foremost members of the bar of Ohio. He was born at Steubenville, Ohio, in 1817; had been a practitioner for forty-seven years, and literally "died in the harness." The *Washington Law Reporter* mentions the death of Richard T. Merrick, Esq., which took place in that city on the 23d of June. Mr. Merrick was, at the time of his death, a member of the special committee of the American Bar Association, of which David Dudley Field is chairman, on the subject of delays and uncertainties in judicial administration. The *Washington Law Reporter* says of him: "Every bar has its leader, and every community its most eminent lawyer; but the remarkable feature of his career lies in the fact that, residing here in the District of Columbia, without the advantages of official position, political prominence or a constituency, by his sheer innate wealth of intellectual and personal qualities, he attained not merely a local but a national reputation as a lawyer of the highest order, and made his name a familiar one, cherished as well as respected, not only in the profession, but among the people of every part of the Union."

THE FORREN'S SYSTEM OF LAND TRANSFER.

We call the attention of law reformers to what is known as Forren's System of Land Transfer, which was explained at some length in a late issue of the *American Law Review*. The leading principle of the system is that the recorder of deeds grants a certificate of title, which serves as the symbolical representative of the land and passes by a written transfer, very much as a warehouse receipt passes. Of course, to make every new transfer effective, it would be necessary that the transferee should bring the certificate in and have his transfer recorded; but as this recording consists of a few words it would consume but a few minutes time and be very inexpensive, while at the same time it would impart effective notice to the world, under the operation of our recording acts. The system, of course, can be varied to suit various views and exigencies. Suppose, for instance, a man owns a house and lot on Olive street, in St. Louis. A plat or description of it is recorded in a book, the owner shows to the recorder his muniments of title, which show that title is *prima facie* in him. He gets a recorder's certificate, refering to the book and page in which his title with a plat is registered. On the opposite page are blank spaces for the entry of transfers. The next day he sells the property to Brown; he does this by writing on the back of the certificate: "For value received I hereby assign the within named tract of land to John Brown with warranty." John Brown would take the certificate and present it to the recorder and the recorder, who would make an entry like this opposite the plat and description of the land: "Assigned to John Brown with warranty," giving the date of the assignment. The statute could be so framed as to attach the proper legal significance to the words "with warranty," so as to give such an assignment the effect of an ordinary warranty deed conveying all the estate which the grantor has. A mortgage or deed of trust to secure a loan could in like manner be made by endorsement upon the certificate of a few simple words prescribed by statute, and the statute should define the legal incidents of such a mortgage or deed of trust and the manner of its enforcement. Our readers see the principle. Of course it requires development. Some inconvenience might attend the introduction of it at first. But our present system of land transfer is entirely behind the mercantile spirit of the age.

NOTES OF RECENT DECISIONS.

WORDS AND PHRASES [CHILD]—DEFINITION OF THE WORD "CHILD" IN A PENAL STATUTE.—A statute of Texas, relating to aggravated assault, declares an assault to be aggravated, "when committed by an adult male upon the

person of a female or child."[1] In *Bell v. State*,[2] the question of the meaning of the word "child" in the above statute was presented for decision for the first time to the Texas Court of Appeals. The court held that the word should be understood as meaning a boy under fourteen years of age, or a girl under twelve years of age. The reasoning by which the court arrived at this conclusion will appear from the following extract from the opinion of the court, delivered by White, P. J.: "One of these rules is that 'words which have their meaning specially defined shall be understood in that sense though it be contrary to their usual meaning, and all words used in this Code, except where a word, term or phrase is specially defined, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed.'[3] Again: 'All words and phrases used in this Code are to be taken and understood in their usual acceptation in common language, except where this meaning is particularly defined by law.'[4] Resort, then must be had to the common meaning and acceptation of the word 'child.' Mr. Webster defines it to mean 'a young person of either sex; hence one who exhibits the character of a very young person;' and this is its common acceptation. It means a young person as contradistinguished from one of age sufficient to be supposed to have settled habits and fixed discretion. Mr. Webster defines the word 'boy' to mean a male child from birth to the age of puberty; and 'puberty' in the civil law is 'the age in boys of fourteen and in girls of twelve years.'[5] As the law now stands we believe that the age of fourteen in boys and twelve years in girls limits the age of childhood."

NEW TRIAL [UNSWORN JURY]—NEW TRIAL, WHEN NOT GRANTED BECAUSE JURY WAS NOT SWORN.—In the case of *Jenkins v. The City of Hudson*,[6] there was a motion for a new trial before Westbrook, J., in a case in which the plaintiff had recovered $2,500 damages against the City of Hudson for negligently causing the death of her husband. In support of the motion it was shown that the cause had gone to trial and that the verdict had been rendered without the jury, or any member of the jury, being sworn. It was the practice in the particular court to swear the trial jurors in a body at the commencement of court for the trial of all the civil causes at that circuit. It seems that the clerk neglected this duty at the circuit at which this cause was tried, and after the selection of the jury, the trial proceeded without anything being done or said as to the swearing of the jury. The trial was begun April 13, 1885, the cause submitted to the jury on the 22d, and the verdict rendered on the 23d. The counsel for the defendant did not learn that the jury was not sworn until the said 23d day of April, about an hour previous to the verdict. The learned judge, in a carefully drawn opinion, denied the motion, on the ground that, by going to trial before a jury which had not been sworn, the defendant had waived the right to have the jury sworn in the cause. The only case which he cited on a closely similar point was Hardenburg v. Crary,[7] where the cause went to trial with one of the jurors unsworn, which fact was unknown to the parties; and it was held not a good ground for new trial, because it was the duty of the objecting party to know whether or not all the jurors had been sworn. There is much authority to the effect that irregularities in selecting and drawing a jury, of which the parties ought to take notice, are deemed waived unless objection therefor is made at the proper time during or before the trial. There is a difference of opinion on the question whether the record must show affirmatively that the jury were sworn, growing out of the different practice of different courts. The weight of authority in criminal cases is that the record must affirmatively show that fact, and that in the silence of the record it will not be presumed.[8] But in some States

[1] Tex. Penal Code, Art. 496, Subdivision 5.
[2] 5 Tex. Law Review, 459.
[3] Penal Code, Art. 10.
[4] Code Crim. Proc. Art 59.
[5] Bouvier, Law Dic.
[6] Reported in the New York *Daily Register* for August 13, 1885.
[7] 15 How. Pr. 307.
[8] Nels. v. State, 2 Tex. 280; Cannon v. State, 5 Tex. App. 34; Kennon v. State, 7 Tex. App. 326; State v. Gates, 9 La. An. 94; State v. Douglass, 28 La. An. 425: State v. King, Id. 425; State v. Philips, 28 Id. 387; Botsford v. Yates, 25 Ark. 282; Lacy v. State, 58 Ala.

where the practice prevails, in civil cases not of swearing the jury in each case, but of swearing the entire panel at the commencement of the term, it has been held that a recital in the record of the trial of each case, that the jury were sworn in the case, is superfluous.[9] By the Mississippi cases last cited, several earlier decisions in that State are overruled.[10] It has been ruled that where the jurors are not so sworn for the term, the record ought to show that they were sworn in each case.[11] But the ground upon which the learned judge proceeded in the case first cited above, if well taken.—and it seems to be well taken in its application to civil cases,—would render a recital in the record superfluous; for if the jurors were not sworn, the irregularity could not be made available as a ground for a new trial, unless it should appear that objection were made to the defect before going to trial, and it would seem on principle to be quite immaterial whether the objecting party or his counsel knew that the jury were sworn or not; since the swearing of the jury is a public matter which takes place in open court, and it is their duty to be present and to know whether it takes place or not. It would therefore seem that the decision in the case on which we are commenting, is entirely sound, and that the Supreme Court of Vermont made too great a concession for a civil case, when it said, substantially, that before a new trial will be granted because of the fact that a jury was not sworn, it must be demonstrated to the satisfaction of the court that the party complaining and his attorneys were ignorant of the fact until after the verdict.[12] Of course, what is here said has reference to civil cases only, but no doubt the same rule would apply in most jurisdictions in trials for misdemeanors; though a prisoner put on trial for a felony, and especially for a capital felony, would not perhaps be understood as impliedly waiving so important a right by his failure to object at the time.[13]

[13] On the question of objections after verdicts, for irregularities touching the constitution of the jury, see Thompson & Merriam on Juries, §§ 294–305.

TRIAL OF ADVERSE CLAIM OF TITLE IN SUIT TO FORECLOSE A MORTGAGE.

It is well settled that in a foreclosure proceeding the complainant cannot make a person who claims adversely to both mortgagor and mortgagee a party and litigate and settle his rights in that case.[1] This is true no matter what the pleadings may be, and even where no objection is made on this ground in the court below or in the Supreme Court; the decree will be framed so as not to operate on such adverse title.[2] No decree could be rendered against one having a paramount title. He could not be prejudiced by any decree in the cause even if made a party, and his rights not saved by the terms of the decree.[3]

Story states the rule generally, that no person need be made a party to a bill, who claims under a title paramount to that brought forward and to be enforced in the suit.[4] Those claiming either legal or equitable estates adverse to that of the mortgagor, are not proper parties to a proceeding to foreclose the mortgage, as they have no interest in the subject of the action.[5]

So it is held that a defendant in a foreclosure suit, who is proceeded against in the action as one claiming an interest subsequent to the plaintiff's mortgage, cannot compel the plaintiff, by an answer setting up a paramount title, to litigate that title. Such an

385; Baird v. State, 38 Tex. 599; State v. Calvert, 32 La. An. 224; State v. Reid, 28 La. An. 387.

[9] Pierce v. Tate, 27 Miss. 283; Furniss v. Meredith, 43 Miss. 302; Hewett v. Cobb, 40 Miss. 61; Clark v. Davis, 7 Tex. 556; Drake v. Brander, 8 Tex. 35; Waddell v. Magee, 53 Miss. 687; see also Goyne v. Howell, Minor (Ala.) 62: Perdue v. Burnett, Minor (Ala.) 138.

[10] Wolfe v. Martin, 1 How. (Miss.) 30; Beall v. Campbell, 1 How. (Miss.) 24; Irwin v. Jones, 1 How. [Miss.) 497.

[11] Kitter v. People, 25 Ill. 42.

[12] Scott v. Moore, 41 Vt. 205.

[1] Dial v. Reynolds, 96 U. S. 340; Barbour on Parties in Equity, 493; Summers v. Bromley, 28 Mich. 125; Wilkinson v. Green, 34 Mich. 221; Eagle Fire Co. v. Lent, 6 Paige, 637; Frost v. Koon, 30 N. Y. 428; Roberts v. Wood, 38 Wis. 60; Strobe v. Downer, 13 Wis. 10; Pelton v. Farmin, 18 Id. 222; Hekla Fire Ins. Co. v. Morrison, 56 Wis. 133; 2 Jones on Mortgages, §§ 1440, 1445; Comley v. Hendricks, 8 Blackf. (Ind.) 189; Pomeroy Rem., § 345.

[2] Summers v. Bromley, 28 Mich. 125.

[3] Comley v. Hendricks, 8 Blf. (Ind.) 189.

[4] Story Equity Pleadings, § 230.

[5] Croghan v. Minor, 53 Cal. 15; Fletcher v. Holmes, 32 Ind. 507.

answer does not meet the allegations of the bill against him.[6] And such a defendant would not be barred from asserting a prior claim[7] by a judgment taken against him by default. An answer of paramount title, directed to such allegation in a complaint, is equivalent to a disclaimer of such subsequent interest, and the action as to such defendant may be dismissed.[8] And it is said to be error to determine a title hostile to the mortgagor, though litigated.[9] But in an earlier case, in the same court,[10] where the mortgagee in his complaint, in opposition to the legal title in a third party, alleges a superior equitable title in the mortagor, and that it is covered by the mortgage, and demands that such third party (who is made defendant) convey or the title be adjudged to have been in the mortgagor, and such third party answers in denial, it was intimated that the question should have been adjudicated. And of course it is proper to establish the priority of various liens in a suit to forclose one of them.[11]

Neither an equitable action for the discharge of a mortgage nor an action under the statute for determining adverse liens, can be maintained against a mortgagee by one whose only estate or interest in the premises is founded on a title adverse, and, if valid, paramount to that of the mortgagor.[12] When a question of title arises in such a case either on demurrer, or on pleadings and proofs in a court of chancery, the chancellor will look into it far enough to see what is its character, and, having ascertained that, should order the bill dismissed as to the party improperly before the court. The plaintiff should do this at the earliest opportunity, unless willing to take the responsibility of showing that the title so asserted arose subsequent to the mortgage.[13] If the superiority of the claim be established, the parties are left as they stood before the suit; if it is shown to have arisen subsequent to the mortgage, then the decree ought to bind the party claiming. This practice, however, allows the question to be litigated. This disputed question of fact may not appear clear till the end of the suit, and is then presumably decided contrary to the wishes of one of the litigants. If he is bound that is the end of the claim; if not the litigation has been fruitless, and should not have been permitted to embarrass the foreclosure suit.

It is evident, therefore, notwithstanding the current of authorities which declare that it is not proper to raise or try such an issue in a foreclosure suit, that a judgment by default, or upon pleadings and trial of such an issue, might be very embarrassing in a subsequent suit to enforce the adverse title. If the judgment was simply erroneous, it would be none the less embarrassing.[14]

The effect of a trial or adjudication of an adverse claim of title will depend very greatly upon the nature of the allegations as to the claim made in the bill. Of course, if it is stated in the bill that the defendant claims title to the premises paramount to the title of the mortgagor, a general demurrer by such defendant should be sustained and the action as to him dismissed, and advantage might be taken of it at any stage of the proceedings.[15] Such an allegation, however, would never be made, unless coupled with a denial of such right, or an assertion intended in some way to show it to be subsequent and subject to the mortgage. The latter form of pleading might resist a demurrer by the claimant of a paramount title, and might be sufficient on a default by him to sustain a judgment barring his claim. For if the fact turn out to be that his claim, though asserted by him to be paramount, was subordinate to the mortgage, of course it ought to be barred. But if the complaint only alleges a claim of some interest by him, which claim is alleged to be subsequent and subject to the mortgage, he may

[6] Pelton v. Farmin, 18 Wis. 222.

[7] Emigrant Sav. Bank v. Goldman, 75 N. Y. 127; Smith v. Roberts, 91 N. Y. 470; Straight v. Harris, 14 Wis. 553; McCormick v. Wilcox, 25 Ill. 247. Nor is a cross complaint by holder of adverse title against plaintiff a proper proceeding to quiet title as to mortgage, such cross complaint should be dismissed. Odell v. Wilson, 63 Cal. 159.

[8] Roberts v. Wood, 38 Wis. 60. But compare Wicke v. Loke, 21 Wis. 416; Roche v. Knight, 21 Wis. 329, to effect that plaintiff may accept and try such issue, or have the action dismissed as to such defendant.

[9] Supervisors, etc. v. Railroad Co., 24 Wis. 93.

[10] Palmer v. Yager, 20 Wis. 91.

[11] Woodworth v. Zimmerman, 92 Ind. 349; Porter v. Reid, 81 Ind. 569; Supervisors, etc. v. Railroad Co., 24 Wis. 93; Dawson v. Banbury Bank, 15 Mich. 489.

[12] Banning v. Bradford, 21 Minn. 308.

[13] Corning v. Smith, 6 N. Y. 82.

[14] See Freeman on Judgm., § 303, where he says that "if the adverse claim of a party be set up and in fact litigated the decree is binding on him." But he cites no authority on the point.

[15] Summers v. Bromley, 20 Mich. 125.

safely suffer default, without affecting his right to enforce a prior or paramount claim. This is the form in which the question has been presented in a large proportion of the cases.[16]

Yet, notwitstanding the current of authority, both of courts and text writers, against the propriety of trying the question of title in a foreclosure suit, the cases where it has been attempted have been very numerous. This tends to show the impression among practitioners that it is possible to bar or establish title in this manner. And the courts of Indiana and Kansas go so far as in terms to sanction the practice, though perhaps in neither State has the question been so directly adjudged as to establish the rule. In the case of Bradley v. Parkhurst,[17] the adverse claimant made a motion to compel the plaintiff to make the petition more specific, by showing the nature of the claim, when and where derived, and whether acquired prior or subsequent to the mortgage, which motion being overruled, he filed an answer denying title in the mortgagor and alleging full title in himself. After trial a decree of foreclosure was entered and an order barring him of all interest in the premises. This judgment was affirmed, Brewer, J., delivering the opinion, and Valentine and Horton, J. J., concurring in the result, but dissenting from the reasons assigned. The learned justice who delivered the opinion, while admitting the old practice to forbid such an issue, treated the matter as a question of the construction of the statute. "The code, section 83, authorizes the joinder of several causes of action, whether legal or equitable, or both, where they arise out of the same transaction or transactions connected with the same subject of action; but the causes of action so united must affect all the parties to the action, except actions to enforce mortgages or other liens." He concludes that the title to the land is so connected with the mortgage upon it, that they can be said to be connected with the same subject of action. The land is the connecting link between the mortgage and the adverse title. This reasoning seems to be more artificial than sound. The New York Code, § 167, contains the same provision; yet the courts of that State have adhered finally to the rule laid down for the first time in Eagle Fire Co. v. Lent, as given at the beginning of this article.[18] The codes of Wisconsin,[19] Minnesota[20] and Nebraska,[21] contain the same provision, yet those States have adhered to the same rule; though I am not aware that the code has been invoked in any of those States to establish the contrary practice.

In Fitzpatrick v. Papa,[22] it is said by Elliott, J., that "it is proper to make an issue involving the title to land in actions to foreclose mortgages." And in Masters v. Templeton,[23] the same learned judge declared that "it has long been the law of this State that conflicting claims of title may be settled and questions of priority determined in foreclosure suits, whenever the proper issues are tendered." But in neither of those cases was the title put in issue, and the remarks quoted were not necessary to the decision of the cases, except as to priority in the latter. This exception to the general rule of equity practice if established in Indiana has crept in by a flank movement, and not by reason of the liberality of the provisions of the code. In an early case[24] the general rule was declared. The departure began in an action of partition in the court of Common Pleas, which, by the statute had no jurisdiction in any case where the title to real estate was in issue, but had express authority to try partition cases. The Supreme Court held[25] that as every petition for partition must aver the titles of the parties interested, it would follow that in every such petition the title would appear to be in controversy, and the settlement of the title becomes necessary in order to be able to effect the partition, the jurisdiction in partition cases therefore draws with it the power to determine the title. In the

[16] Corning v. Smith, 6 N. Y. 82; Smith v. Roberts, 91 N. Y. 470; Emigrant's Sav. Soc. v. Goldman, 75 N. Y. 127; Strobe v. Downer, 13 Wis. 10; Straight v. Harris, 14 Wis. 553; Pelton v. Farmin, 18 Wis. 222; Odell v. Wilson, 63 Cal. 159; Freeman on Judgments, § 303; 25 Ill. 247.

[17] 20 Kansas, 462.

[18] Corning v. Smith, 6 N. Y. 82; Frost v. Koon, 30 N. Y. 428; Emigrant Saving Soc. v. Goldman, 75 N. Y. 127; Smith v. Roberts, 91 N. Y. 470.

[19] Wis. Stats. 1871, ch. 145, §§ 31, 32.

[20] Code Minn., § 103.

[21] Code Civ. Pro. Neb., §§ 87, 88.

[22] 89 Ind. 17.

[23] 92 Ind. 447.

[24] Comly v. Hendricks, 8 Blackf. 189.

[25] Wolcott v. Wigton, 7 Ind. 44.

next case,[26] involving the point as to the jurisdiction of the Common Pleas court in a foreclosure suit where the title to real estate was brought in issue, the court could see no reason why the rule just stated as to partition cases should not apply, and say, "We are therefore inclined to hold that the jurisdiction given to the court to foreclose mortgages confers also the power in such cases to settle the title to real estate, whenever it shall be in issue." In a later case[27] the jurisdiction was sustained and the additional reason given that "otherwise it would be frequently ousted." The propriety of trying the title of an adverse claimant does not appear to have been raised in any of these cases, nor of any other cases in that court. But the doctrine has received such recognition by able judges, speaking for the court without dissent, and is probably so generally acted on by the profession in the State, that it is likely to be asserted with authority when a case arises which calls for a decision.

The code of Indiana authorizes the plaintiff to unite several causes of action in the same complaint when they are included in certain specified classes. One class includes actions to recover possession of real property, to make partition of land, and to determine and quiet the title to the same. Another class includes claims to foreclose mortgages and enforce liens.[28] The uniting of causes of action belonging to one of these classes with those belonging to another, is ground for demurrer for misjoinder. The effect of sustaining the demurrer is that the court will require the plaintiff to docket each cause separately,[29] but a refusal to sustain or overrule the demurrer would not be ground for reversing the judgment;[30] and, if no objection is taken by demurrer, it is deemed to be waived.[31] The causes of action which may legally be united, must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered.[32] The court may order separate trials of causes so united, for the furtherance of justice.[33]

The bearing of the above cited provisions of the Indiana code have never been considered in any case that has arisen, in which the propriety of trying titles in this way has been mooted. But in Masters v. Templeton,[34] Elliott, J., in discussing the general subject, says: "Our code provides that any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved. This is a very comprehensive provision, and was meant to confer authority to settle in one suit all conflicting claims to property involved in the litigation." It will be observed that it is a "person having an interest in the controversy adverse to the plaintiff," who may be made a defendant, not a person having an interest in the property involved in the controversy. The controversy in a foreclosure suit is not concerning claims of title paramount to the mortgagor, or adverse to him. It is a question regarding the validity of the mortgage and its amount, and concerning the priority of the various liens upon the property. The object of the proceeding is to bar the equity of redemption of the person giving the mortgage, and to convey to the purchaser under the decree the title held by him at that time. It is not the object to give a perfect title, or to give him any better title than the mortgagor had, nor even to determine whether he had any title at all. The mortgagor himself is estopped to deny his title. If it is proper to try title in a foreclosure suit, conversely it would be proper to try a foreclosure suit in an action to recover the land. It would be immaterial whether it was the holder of the adverse title or the mortgagee who went forward. A cross complaint is merely a complaint by one who is named a defendant in the action. Yet no good lawyer would think of making the mortgagee defendant to an action to recover the land. Good practice would seem to require the maintenance of the old doctrine of the equity courts.

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[26] Toner v. Mitchell, 13 Ind. 530.
[27] Ewing v. Patterson, 35 Ind. 326.
[28] § 278, Code 1881.
[29] § 340, Code 1881.
[30] § 341, R. S. 1881.
[31] § 343, R. S. 1881.
[32] § 278, R. S. 1881.
[33] § 280, Ind. R. S. 1881.
[34] *Supra.*

WAIVER OF JURY TRIAL.

IN RE STAFF.*

Supreme Court of Wisconsin, June 1, 1885.

1. CRIMINAL LAW AND PROCEDURE. [*Constitutional Law.*]—*Waiver of Jury Trial—Constitutionality of Laws Wis. 1881, Ch. 197, Sec. 8.*—The provisions in the statute, creating the municipal court for Rock county, that "a jury trial in said court in criminal cases, begun by information, or not originally begun in said court, may be waived by the accused in writing, or by consent in open court, entered on the minutes," is not unconstitutional. So held where the conviction was for larceny. State v. Lockwood, 43 Wis. 403, distinguished.

2. ———. [*Habeas Corpus.*]—*Legality of Sentence Tested by.*—Where a party has waived his right to a jury trial under such statute, and has been convicted and sentenced to imprisonment, the legality of his confinement may be tested by *habeas corpus*.

Habeas corpus.

C. N. Scanlan, for petitioner. *Asst. Atty. Gen. H. W. Chynoweth*, for the warden of State prison.

LYON, J., delivered the opinion of the court:

A writ of *habeas corpus* having been duly issued out of this court, directed to the warden of the State prison, commanding him to produce before this court James Staff, then in his custody, to the end that the legality of his imprisonment might be inquired into, such warden, in obedience to the mandate of the writ, has brought the said Staff before the court and made return to the writ.

The cause for the imprisonment of Staff is undisputed. It appears, both by the petition upon which the writ was allowed and issued, and by the return of the warden to the writ, that the prisoner was convicted in the municipal court of Rock County on an information charging him with the crime of larceny from the person of one Chubbuck, of a pocket-book and money therein, of the value of $84.75, and was thereupon sentenced to imprisonment for two years in the State prison. The information and the form of the judgment and commitment are regular, and no question is raised upon either.

The only alleged defect in the proceedings is that when the prisoner was brought up for trial, on his plea of not guilty, he expressly waived a jury trial, and such waiver was duly entered in the minutes of the court. Thereupon he was tried by the court without a jury, and by the court found guilty and sentenced. It is now claimed in his behalf that it was not competent for him to waive a jury trial, and hence that his conviction was illegal and void, and the court had no jurisdiction to proceed thereon to judgment and sentence. If the prisoner could not effectually waive a trial by jury, the court had no jurisdiction to try him, and the conclusion seems undeniable that the judgment would, in that event, be entirely void. Hence, upon the petitioner's theory of the case, *habeas corpus* is the proper remedy, notwithstanding it is well settled that mere irregularity in proceedings resulting in the imprisonment, however flagrant, is not sufficient ground to discharge on *habeas corpus*. That may lawfully be done only where the proceedings are void for illegality. *In re* Crandall, 34 Wis. 173; *In re* Pierce, 44 Wis. 411; Hurd. Hab. Corp. 327. Failing the jurisdiction of the court to try and convict the accused without a jury, the court exceeded its jurisdiction as to subject-matter and person, and its judgment and process of commitment, although in proper form, were issued in a case not allowed by law. Such alleged excess, or want of jurisdiction may be inquired into on *habeas corpus*, and if found to exist is ground for a discharge of the accused. Rev. St. p. 872, § 3428, subds. 1, 4.

Was it competent for the prisoner to waive his right to be tried by a jury? His counsel maintains that the judgment of this court in State v. Lockwood, 43 Wis. 403, answers this question in the negative. The assistant attorney general refers us to the statute creating the municipal court for Rock county, (chapter 197, Laws 1881,) and to the following clause in § 8 thereof, to-wit: "A jury trial in said court in criminal cases, begun by information, or not originally begun in said court, may be waived by the accused in writing, or by consent, in open court, entered on the minutes," and maintains that, under this statute, the above question must be answered in the affirmative. If the statute be sustained, the trial of the prisoner was regular, and the conviction cannot be questioned. The precise question to be determined, therefore, is this: Is the provision of the statute above quoted, a valid law? It certainly is a valid law, unless it contravenes § 7, article 1, of our constitution, which ordains that, "in all criminal prosecutions, the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and, in prosecutions by indictment or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed, which county or district shall have been previously ascertained by law."

The cases which hold that in a criminal prosecution the accused cannot effectually waive a jury trial are quite numerous, and, as was said by the late chief justice in State v. Lockwood, such is undoubtedly the current of authority. None of those cases, however, involve the consideration of statutes like that under consideration. They were determined upon general principles without regard to statutes, and they disclose a radical difference of opinion by different courts as to the grounds upon which the rule is based.

The constitutional provision above quoted is found in nearly or quite all of the State constitu-

*S. C., 23 N. W. Repr. 587.

tions, as well as in the amendments to the Constitution of the United States. Article 6, amendment of 1791. Some courts have held that it prescribes the tribunal in which, and before which, criminal prosecutions must be tried, and that a jury is an essential part of such tribunal, and cannot therefore be dispensed with by consent of the accused, or otherwise. A leading case which sustains this view of the provision, is that of Cancemi v. People, 18 N. Y. 128. In that case the prisoner was, with his consent, tried by eleven jurors and convicted. The judgment was reversed for that reason. Manifestly the same principle is involved where the whole jury is waived, for eleven jurors is not a good common-law jury. In the opinion of the court, written by Judge Strong, it is said: "But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant." This opinion is fortified (or attempted to be) by reference to the Cases of Lord Dacres and Lord Audley, in England. Lord Dacres was indicted for treason in 1535, and was tried by his peers, the duke of Norfolk being high steward. All of the judges assembled on the day before the trial to resolve certain questions which might arise upon the trial. One of these questions was whether the prisoner might waive his trial by his peers and be tried by the country, and they all agreed he could not, resting their decision upon the following clause of Magna Charta: "No free person shall be taken or imprisoned, or shall be dispossessed of any free tenement of his, or his liberties or free customs, nor shall he be outlawed or be punished in any other way; nor will we come upon him, nor send him to prison, unless by legal decision of his equals, or by the law of the land." Magna Charta by Wells 65, § 29. When arraigned and asked how he would be tried, the report says the prisoner "took long time to consider, and would not have put himself upon his peers; but at last the high steward told him that he must give judgment against him as a traitor unless he put himself upon his peers, as against one who refused the tryal of law; and thereupon he put himself for his tryal upon his peers." Case of Lord Dacres, J. Kelyng's Crown Cas. 89. It may be a relief to know that Lord Dacres was acquitted, and an acquittal in prosecutions for treason was so rare in those days that this fact is mentioned, in an extract from Hargrave, found in 1 How. St. Tr. 407, as an apology or inducement for mentioning the case.

Lord Audley was tried in 1631 on an indictment for felony. As in the case of Lord Dacres, the judges were summoned before the trial and the question, among others, was submitted to them whether a peer of the realm might waive his trial by his peers and plead he will be tried by God and the country. The judges answered: "He might not; for his trial by peers was no privilege, but the law declared by Magna Charta; which if he would not plead to by a trial of his peers was standing mute." Case of Lord Audley, 3 How. St. Tr. 401.

The language of Magna Charta is that no free person shall be imprisoned "unless by legal decision of his equals." This is not the conferring of a privilege upon the accused, but prescribes the tribunal by which he shall be tried; hence the judges said that it was no privilege, but the law. See, also, 2 Wooddeson's Lectures, 581 (2d Ed. 346.) So, also, the Constitution of the United States as originally adopted provided that "the trial of all crimes, except in cases of impeachment, shall be by jury." Article 3, § 2. Under such a provision it could most undoubtedly be held that in the trial of criminal causes other than impeachments a jury could not be dispensed with by consent of the accused, or otherwise. But the provision of our constitution above quoted, as well as that of New York, is entirely different. In terms it grants privileges. Its language is: "The accused shall enjoy the right, * * * in prosecutions by indictment or information, to a speedy public trial by an impartial jury," etc. It seems to us that the courts of New York, and other courts which have adopted the same reasoning, have overlooked this distinction.

It is obvious that if the constitutional provision under consideration was correctly interpreted by the New York court,—that is to say, if the constitution prescribes the tribunal for the trial of criminal prosecutions, and makes a jury an essential part of it,—it is beyond the power of the legislature to change the tribunal by eliminating the jury therefrom, or by allowing the accused to do so.

It may here be observed that Cancemi v. People was a capital case, the indictment and conviction having been for murder, which was and is punishable by death in that State. Many of the cases which hold that the prisoner cannot effectually waive a jury are of the same class. The judgments in those cases may well be sustained, on the principle or rule which has sometimes been asserted that in capital cases, in *favorem vitæ*, the prisoner can waive nothing. It may also be remarked that some of the cases seem to make a distinction between felonies and misdemeanors holding that in a prosecution for a misdemeanor a jury may be dispensed with by consent of the accused. This distinction was ignored in State v. Lockwood, 43 Wis. 403; and in respect to misdemeanors, the punishment for which is or may be imprisonment, there seems to be no substantial ground upon which to rest the distinction. If the line can be drawn between different grades of crime, perhaps a plausible reason might be given for holding that misdemeanors punishable by fine only are distinguishable from other crimes. It might be said that a criminal prosecution for such a misdemeanor is, in its results, essentially like a

civil action sounding in tort. In either case, judgment against the defendant is for dollars and cents only, and imprisonment may follow non-payment thereof.

Some courts, notably the Supreme Court of Iowa, in view of the peculiar terms of the constitutional provision under consideration, have held that the rights guaranteed therein are merely privileges granted the accused, which he may waive, without the aid of any statute. It was so held in State v. Kaufman, 51 Iowa, 578; s. c., 2 N. W. Rep. 275. The opinion is by Judge Seevers, and it would be hard to refute the vigorous logic with which he sustains the conclusion and judgment of the court. It is not necessary, however, for us to go to that extent in this case, and indeed we cannot do so without overruling the case of State v. Lockwood, *supra*. That judgment was upon the ground that the right of trial by jury secured by the Constitution rested upon public policy, and could not, therefore, be waived by the defendant.

It has already been observed that in State v. Lockwood, and in numerous other cases elsewhere which hold the same doctrine, no question of the power of the legislature to provide for the waiver of a jury was involved or considered. The question is now raised for the first time in this court. We find no provision in the Constitution which denies to the legislature the power to permit a person charged with crime to waive a jury and be tried by the court. There may be circumstances which would lead the accused to desire such a trial, and it might be greatly to his benefit. Why should he be denied the privilege? In the absence of a statute conferring it, there may be some good reason resting in considerations of public policy (although perhaps not very apparent) why he should not have such privilege. But when the legislature says that he may have it, and thus establishes a different public policy, what constitutional rule is violated? Public policy is to some extent a creation of the legislature. The statutes embody much of the public policy of the State, and that policy may be one thing to-day and the opposite to-morrow, as the legislature in its wisdom may enact. It was the public policy of the State to deny to persons about to be tried for crime the power effectually to waive a jury. It is now its policy to permit such waiver in the municipal court for Rock county, and in some other courts, and perhaps hereafter the same policy may be extended to all trial courts in the State. We cannot perceive wherein such legislation infringes the Constitution. We have more difficulty in finding a satisfactory reason for holding that any legislation is required to confer the right to waive a jury. Section 7 of article 1 confers many rights upon a person accused of crime, every one of which he may waive, without authority of statute, as has often been judicially determined, except the right to be tried by a jury. Such waiver may be express, or it may be by failure to make due objection and exception. The accused shall enjoy the right to be heard by himself and counsel; yet he need not have counsel unless he chooses, and need not say a word in his own defense; he may plead guilty, and thus waive every right conferred in the section. He may demand the nature and cause of the accusation against him; yet when arraigned he may waive the reading of the indictment or information. He has the right to meet the witnesses face to face; yet he may lawfully consent to the reading of depositions of absent witnesses in evidence. He is entitled to compulsory process to compel the attendance of his witnesses; yet he may not avail himself of such process. He is entitled to a speedy public trial; yet, with his consent, trial may be delayed for years, and no doubt the public at large may be excluded from the trial at his request. He is entitled to a trial in the county or district previously ascertained by law wherein the offense was committed; yet he may have a change of venue, and, with his consent, the cause may be sent to some county or district and tried therein, hundreds of miles distant from that in which the crime was committed. He is entitled to be tried by a jury, that is, a common-law jury, which must consist of twelve qualified jurors; yet, if one of the jurors is disqualified for alienage or other cause, in this State the objection is waived by the failure of the accused to challenge such juror. State v. Vogel, 22 Wis. 471.

It is not strange that the Supreme Court of Iowa, untrammeled by previous adverse decisions in that State, added to the list the only remaining right given the accused by section 7, and held that without any statute authorizing it, the accused may also waive the right to be tried by a jury. The reason why we cannot go to the same extent has been already suggested. But we have no difficulty whatever in holding that the public policy which stood in the way of an effectual waiver of a jury by the accused in a criminal case is not so inherent in the form and frame-work of our government as to place it beyond the reach of legislative interference, but that it is the subject of legislative control. In this view we are sustained by ample authority in other States where laws have been enacted authorizing the waiver of juries in criminal cases, and by other cases in States where no such laws have been enacted, but which recognize the power of the legislature to do so. State v. Worden, 46 Conn. 349; Ward v. People, 30 Mich. 116; Dillingham v. State, 5 Ohio St. 280; State v. Mansfield, 41 Mo. 470; Brown v. State, 16 Ind. 496. In the opinion by Judge Carpenter in State v. Worden, *supra*, will be found a very able and interesting discussion of the subject.

The cases which illustrate and affirm the foregoing propositions are very numerous. It has been thought necessary to cite but a few of them. Reference to many of these cases will be found in Cooley, Const. Lim. 391, note 2 (5th ed.), in the notes to section 113, Proff. Jury Tr.; in an article by Judge Elliott,* in 6 Crim. Law Mag. 182 (No.

*Mistake; a son of Judge Elliott.

2, March, 1885), on "Waiver of Constitutional Rights in Criminal Cases;" and in the able brief herein of Mr. Chynoweth, the assistant attorney general.

Our conclusion is that the act of 1881, under consideration, is a valid law, and hence that the defendant effectually waived his right to a jury trial, and was properly tried by the court. The judgment and sentence are therefore legal and valid, and the prisoner, James Staff, must be remanded to the custody of the warden of the State prison. It is so ordered.

NOTE.—We cite only criminal cases. In State v. Kaufman, 51 Iowa, 578; s. c., 33 Amer. Rep. 148; 1 Crim. L. Mag. 57; 19 Cent. L. J. 313; during the trial, a juror being ill, "with the consent of the defendant said juror was discharged and, with the consent of the defendant, the trial before eleven jurors was resumed, and concluded by order of the court." This action of the court and defendant was held not to vitiate the verdict of guilty returned by the eleven jurors. The case was one of forgery. The court admitted that a jury of less than twelve could not be forced upon the accused, but he consenting, the action was valid; there was a waiver of a right to be tried by a jury of twelve.

In a subsequent case (State v. Carman, 5 Crim. L. Mag. 560; s. c., 18 N. W. Rep. 691, it was held, by a divided court, that the defendant could not waive his right of trial by jury. In the opinion of the court no reference is made to State v. Kaufman, but J. Seevers in a dissenting opinion thinks that case is conclusive upon the question then before the court. To our mind he is right in his deductions from that case; for it seems that there was no statute in Iowa authorizing a trial by a jury of less than twelve jurors. In State v. Carmon, the decision is made to rest upon a statute providing that "An issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded." It was said by the court, "We regard this provision as excluding the jurisdiction of the court without a jury to try such issue, the question presented is not as to the waiver of a mere statutory privilege, but an imperative provision, based, as we view it, upon the soundest conception of public policy." In the State v. Kaufman, there is no statute referred to authorizing a waiver of a trial by a jury of twelve; therefore, in principal and in fact, this case is overruled, and this is the case chiefly relied upon in the principal case.

There are a number of cases similar to State v. Carman, which hold that there can be no waiver of a trial by jury in a criminal case, unless it is expressly authorized by statute. State v. Maine, 27 Conn. 281; Show v. Kent, 11 Ind. 80; People v. Hanschett, 5 Crim. L. Mag. 674; State v. Stewart, 89 N. C. 563; U. S. v. Taylor, 3 Crim. L. Mag. 552; s. c. 11 Fed. Rep. 470; Neales v. State, 10 Mo. 498; Williams v. State, 12 Ohio N. S. 622.

These decisions rest upon the ground that there is no law authorizing a trial by the court, and its action is unauthorized; that the judge cannot act in the double capacity of court and jury, and that the consent of the accused cannot confer jurisdiction upon him. Wilson v. State, 16 Ark. 601; Exline v. Smith, 5 Cal. 112; People v. Smith, 9 Mich. 193; League v. State, 36 Ind. 257.

There are, however, a number of authorities which hold that a waiver of a jury may be made by the defendant without a statute authorizing it;—that his right to be tried by a jury of the vicinage is a mere personal privilege which he may insist upon or waive; such a waiver as is made on a change of venue.

State v. Potter, 16 Kan. 80; Sarah v. State, 28 Geo. 576; Armstrong v. State, Minor (Ala.) 160; State v. Brown, 73 N. C. 81; People v. Lyons, 5 Crim. L. Mag. 670; (see 18 Cent. L. J. 481, and People v. Wandell, 21 Hun. 515); Bennett v. State, 4 Crim. L. Mag., p. 381; s. c., 14 N. W. Rep. 912; State v. Cox, 3 Eng. (Ark.) 436; Murphy v. Com., 1 Metc. (Ky.) 365; State v. Borowsky, 11 Nev. 119.

Thus it was held at an early day that the defendant could submit to the court for trial a challenge of a juror, rather than call triers as required by law. People v. Mather, 4 Wend. 229, 245; People v. Rathburn, 21 Wend. 509, 542.

There is abundant authority for holding that a statute authorizing the defendant to waive trial by jury in case of a misdemeanor, when in open court, is constitutional, as was decided in the principal case. State v. Worden, 46 Conn. 349; s. c. 33 Am. Rep. 27; s. c. 1 Crim. L. Mag. 178; Daily v. State, 4 Ohio St., 57; Dillingham v. State, 5 Ohio St. 280; Connelly v. State, 60 Ala. 89; s. c., 31 Am. Rep. 34.

The same is held true in case of felony. Murphy v. State, 97 Ind. 579.

The defendant, in waiving his right to a trial by jury does not waive the right of the prosecution to demand a jury on its behalf, and, after a demand so made, a trial by the court over the prosecution's objection is void and a finding of not guilty will be reversed on appeal. State v. Mead, 4 Blackf. (Ind.) 309.

Several cases hold that if it appear by the transcript of the record on an appeal that a less number than twelve jurors tried the case, it will be reversed. Jackson v. State, 6 Blackf. (Ind.) 461; Brown v. State, 8 Blackf. 561. See State v. Ball, 27 Mo. 324; Rex v. St. Michaels. 2 Blackstone 719; Clyncard's Case, Croke Eliz. p. 654; Doebler v. Com., 3 Serg. & R. 237.

Other cases go farther and hold that a trial by less than twelve jurors is void, and the right to a trial by the full number cannot be waived. Brown v. State, 16 Ind. 496; Allen v. State, 54 Ind. 461; Moore v. State, 72 Ind. 358; Carpenter v. State, 4 How. (Miss.) 163; s. c. 34 Amer. Dec. 116; Bell v. State, 44 Ala. 393; Hill v. People, 16 Mich. 351; Bowles v. State, 5 Sneed (Tenn.) 360; People v. O'Neil, 48 Cal. 257; Cancemi v. People, 18 N. Y. 128; Com. v. Shaw, 7 Amer.L.Reg. (O.S.) 289; s. c. 6 Pitts. L. J., No. 17.

These cases are met by other decisions that the defendant may waive the number twelve and be tried by a less number. State v. Kaufmon, *supra*; Com. v. Daily, 12 Cush. 80; Bennett v. State, *supra*; Murphy v. Com., 1 Met. (Ky.) 365; Tyra v. Com., 2 Met. (Ky.) 1; State v. Cox, 3 Eng. (Ark.) 436; State v. Mansfield, 41 Mo. 470.

A trial by a jury of thirteen has been held void. Bullard v. State, 38 Tex. 504; s. c., 19 Am. Rep. 30; Wolf v. Martin, 1 How. (Miss.) 30; Ross v. Neal, 17 Minn. 407.

In another case it is held that such a trial is valid. Tileman v. Ailler, 5 S. & M. (Miss.) 378; 43 Am. Dec. 521.

As stated by the court in the principal case, the decision in Cancemi v. People, 18 N. Y. 128, is a leading case on the subject of waiver of a jury in a criminal case. The Constitution of New York provided that "a jury trial may be waived by the parties, in all civil cases, in the manner prescribed by law." The court said of this clause: "This is a solemn judgment of the organic law, that, without such a provision, the trial by jury, in cases where it had theretofore been used,

could not be dispensed with." This position certainly seems to be sound, especially in view of the fact that the legislature had made no provision for waiver of a trial in a criminal case; and the decision may well have rested here. But the court proceeded and placed its decision upon the ground referred to in the principal case. This decision has been cited and followed by a number of courts in other States, as well as in New York, and the reasoning used in this second ground approved. Pierson v. People, 79 N. Y. 424, 429; Brown v. State, 16 Ind. 496.

A number of decisions expressly limit the right of waiver to cases of misdemeanors, the cases then before them. Com. v. Daily, Cush. 80; State v. Borowsky, 11 Nev. 119; People v. Riley, 5 Park. Cr. 401; Ward v. People, 30 Mich. 116; Dillingham v. State, 5 Ohio St. 280; Durst v. People, 51 Ill. 286.

Other decisions, by the language used, expressly exclude cases of felony; and some of them expressly hold that there can be no waiver in such cases. State v. Mansfield, 41 Mo. 470; Tyra v. Com., 2 Metc. (Ky.) 1; see Flint River Steamboat Co. v. Foster, 5 Geo. 194; Opinion of Justices, 41 N. H. 550; Williams v. State, 12 Ohio St. 622; Grant v. People, 4 Park Cr. 527. So a number of decisions expressly hold that there can be no waiver even in cases of misdemeanors. Bond v. State, 17 Ark. 290 (see, however, Wilson v. State, 16 Ark. 601); Brown v. State, 16 Ind. 496; Moore v. State, 72 Ind. 358.

There is no good reason for the distinction, so far as we can see, of a power to waive in a case of misdemeanor and lack of power in a felony. In other respects there is no difference in a trial of a misdemeanor and a felony. Thus, for instance, the same kind of proof must be made in both cases; and, however petty the crime, the proof must show its commission by the accused beyond a reasonable doubt. In the case of a misdemeanor the law is just as jealous and tender of the liberty of her subjects as in the case of a felony.

The soundest reason for a distinction between the cases holding that there can or cannot be a waiver of a trial by jury is that there is no statute or provision of the Constitution authorizing a trial by the court, or giving the judge jurisdiction to try the cause; for parties by their consent cannot confer jurisdiction, as is well settled. Such being the case, it necessarily follows that a jury cannot be waived as a corollary to the proposition that the judge cannot try the cause;—that the jury is the only body that has jurisdiction to try the cause.

A recent unreported case in Indiana is worthy of attention. The accused was charged with murder and pleaded guilty, whereupon, without objection from the State or accused, the court sentenced him to be hanged. He appealed and assigned as error that his punishment was assessed by the court and not by a jury.

The Constitution of that State gave the accused "the right to a public trial by an impartial jury in the county in which the offense" was committed. In cases of murder the statute provided that "upon conviction thereof [he] shall suffer death or be imprisoned in the State prison during life, *in the discretion of the jury.*" The criminal code provided that the defendant "with the assent of the court, may submit the trial to the court, except in capital cases. All other trials must be by jury." Another provision of the same code was "where the plea is guilty, or the trial is by the court, the court shall assess the amount of the fine and fix the punishment to be inflicted."

Under these provisions of the law it was held that the action of the court was void; that a jury was the only body that could assess the punishment; that the accused could not make the waiver he did, and the fact that the defendant took no exception to the action of the trial court did not render his appeal unavailable. Wartner v. State, digested in 25 Cent. L. J. 495; Indiana L. J., May 12, 1885 (to be reported in 6 Crim. L. Mag.)

It remains to be seen what will amount to a waiver. It is well to note that every presumption is against a waiver having actually been made. U. S. v. Rathbone, 2 Paine, 578; Perfect v. People, 70 Ill. 171. So, too, a person who would avail himself of the right of trial by a jury must appear and claim it. Armstrong v. State, Minor (Ala.), 160. See Com. v. Whitney, 108 Mass. 5. And agreeing on a reference of the case is a waiver, such that a party cannot afterwards demand a jury. State v. Brown, 73 N. C. 81.

Formerly, in New York, where the accused was arrested for a minor offense, and demanded a trial at a special session of the Supreme Court, he waived his right to a trial by jury. People v. Riley, 5 Park. Cr. 401. See Banrose v. State, 1 Iowa, 374. In Ohio a defendant charged with a petty offense in a police court must specially demand a jury. Billingheimer v. State, 32 Ohio St. 435. And so in Alabama, Wren v. State, 70 Ala. 1.

Where the accused's attorney in open court, in his presence, at the suggestion or request of the prosecuting attorney, consented to go to trial with less than the legal number of jurors' names in the box to be drawn from, it was held that such consent did not render a conviction, otherwise legal, valid; for the reason that "the defendant is morally too much in chains to be competent to make a valid waiver of his rights." State v. Davis, 66 Mo. 684; s. c., 27 Amer. Rep. 387. Where the record on appeal contained a recital that "both parties announced ready for trial, waive a jury, and submit the case to the court," it was held a sufficient waiver. Taylor v. State, 4 Tex. App. 29.

TRESPASS UPON LAND—SEVERING LAND FROM THE REALTY.

McGONIGLE v. ATCHISON.

Supreme Court of Kansas, July 9, 1885.

1. TROVER—*For Conversion of Sand Severed from Realty.*—Where a mere wrongdoer enters upon land in the State of Missouri and severs sand therefrom, and transports it to Kansas, and there converts it to his own use, the sand remains the property of the owner of the land up to the time of the conversion, and he may afterward recover from the wrongdoer the value of the sand in an action brought in Kansas; such action being transitory.

2. ——. [*Pleading.*]—*Surplusage in Petition in Such an Action.*—And in such an action the plaintiff may recover, notwithstanding the fact that the petition may state facts sufficient to constitute a cause of action not only in the nature of trespass *de bonis asportatis* and trover, but also in the nature of trespass *quare clausum fregit*.

3. ——. [*Implied Assumpsit.*]—*Waiving Tort and Recovering Reasonable Values.*—In such action the plaintiff may waive so much of the tort as relates to the trespass upon the real estate, and ask to recover only for the value of the sand.

Error from Leavenworth County.

VALENTINE, J., delivered the opinion of the court:

This case has been brought to this court upon a

"case made," which is a model of brevity and clearness, and reflects great credit upon the able counsel who prepared it. The case has also been very ably presented to this court by counsel on both sides. The amount involved in this controversy seems to be small and trifling, but the principles involved are supposed to be of vital importance, and counsel for plaintiff in error, defendant below, says that the decision of the case involves the possible liability for not only many dollars, but many hundreds of thousands of dollars. We have, therefore, given the case a very careful consideration.

The record of the case, as presented to this court, shows that on October 4, 1883, David Atchison filed his petition in the district court of Leavenworth County, Kansas, in which petition he alleged, among other things, that he was then and had been for more than five years, the legal and equitable owner of a certain piece of land, describing it, situated in Platt County, State of Missouri, and being on what is commonly known as "Leavenworth Island;" that the defendant, George McGonigle, did, on or about March 1, 1883, unlawfully and wrongfully enter upon said premises and dig sand thereon, and remove, take and carry away, to the city of Leavenworth, and convert and appropriate the same to his own use, to-wit: 200,000 bushels, of the value of one cent per bushel, to the damage of the plaintiff in the sum of $2,000, and prayed judgment for the sum of $2,000 and costs. To this petition the defendant answered, the answer being a general denial. Upon the issues as thus made the cause came on for trial before the court and a jury; whereupon the defendant objected to the introduction of any testimony, upon the ground that the petition did not state facts sufficient to constitute a cause of action of which the district court had jurisdiction. This objection was overruled by the court and the trial proceeded, and resulted in a verdict for the plaintiff of $1.00. The defendant moved for a new trial, upon the ground of error of law occurring at the trial and duly excepted to, which motion was overruled and the defendant excepted. Judgment was then rendered in favor of the plaintiff and against the defendant for $1.00 and costs, to which judgment the defendant excepted and now brings the case to this court for review.

Counsel for plaintiff in error, defendant below, states in his brief that the question involved in this case is as follows: "Is this a local or transitory action? Is it trespass *quare clausum fregit* or trespass *de bonis asportatis*?" We think the question may be more properly stated as follows: Do the facts of this case show a cause of action that is transitory or one that is purely local? Or, in other words, do the facts of this case show a cause of action in the nature of trespass *de bonis asportatis* or trover, on the one side, or trespass *quare clausum fregit*, on the other side? If the facts show a cause of action in the nature of trespass *de bonis asportatis*, or trover, then the action is certainly transitory; but if they show only a cause of action in the nature of trespass *quare clausum fregit*, then the action is admittedly local. The distinction between transitory and local actions, both at common law and under the Code, is generally and substantially as follows: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it is one that could only have arisen in one place, then it is local. Hence, actions for injuries to real estate are generally local, and can be brought only where the real estate is situated; while actions for injuries to persons or to personal property, or relating thereto, are generally transitory, and may be brought in any county where the wrongdoer may be found. These propositions we suppose are conceded. But the real contention between the parties to this action is whether the real and substantial grievance set forth by the plaintiff as the foundation for his action is one which related merely to real estate or one which may be considered as fairly relating to personal property. The petition states wrongs relating both to real estate and to personal property. It states that the defendant unlawfully and wrongfully entered upon the plaintiff's premises, in Missouri, and dug sand thereon. This of course was a wrong relating to real estate only; but the petition also states that after the sand was severed from the real estate, the defendant then removed the same to Leavenworth City, Kansas, and there converted and appropriated the same to his own use; and these last mentioned wrongs certainly related to personal property only; for as soon as the sand was severed from the real estate it became personal property. This principle, of things becoming personal property when severed from the realty, is universally recognized by all courts and by all law writers. Besides, the plaintiff in this case, after alleging the above mentioned wrongs, then asks for damages only for the wrongful conversion of the sand, which was personal property, and does not ask for damages for injuries done to his real estate. He seems to waive all the wrongs and injuries done with reference to his real estate and to his possession thereof, provided the digging and the removal of the sand was any injury to either, and sues only for the value of the sand which was converted. We think it is true, as is claimed by the defendant, that the petition states facts sufficient to constitute a cause of action in the nature of trespass *quare clausum fregit*; but it also states facts sufficient to constitute a cause of action in the nature of trespass *de bonis asportatis*, and of trover; and we think the plaintiff may recover upon either of these latter causes of action, for they are unquestionably transitory, although it must be conceded that he cannot recover upon the former cause of action; for it is admittedly local in its character, and because the plaintiff has brought his action in a jurisdiction foreign to the one where this local cause of action arose. But as the plaintiff asks no relief pertaining specially to the local cause of ac-

tion, but only such as may be given upon the facts of the transitory cause of action we think he may recover. All the old forms of action are abolished in Kansas. We now have no action of trespass *quare clausum fregit* nor of trespass *de bonis asportatis*, nor of trover; but only one form of action, called a civil action. Civil Code, § 10. And under such form of action all civil actions must be prosecuted; and all that is necessary in order to state a good cause of action under this form is to state the facts of the case in ordinary and concise language without repetition. Civil Code. § 87. And when the plaintiff has stated the facts of his case, he will be entitled, to recover thereon just what such facts will authorize. Fitzpatrick v. Gebhart, 7 Kas. 42; Kunz v. Ward, 28 Kas. 132. We now look to the substance of things and not merely to forms and frictions. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover, provided he proves the facts. If the facts stated would authorize one of two or more kinds of relief, he may then elect as to which kind of relief he will obtain; and the prayer of his petition will generally indicate his election. And if one kind of relief is beyond the jurisdiction of the court, and the other within such jurisdiction, the plaintiff may elect to receive that kind of relief which is within the jurisdiction of the court. We think the plaintiff may maintain his present action as an action in the nature of trespass *de bonis asportatis*, or trover. When the sand was severed from the real estate it became personal property; but the title to the same was not changed or transferred. It still remained in the plaintiff. He still owned the sand and had the right to follow it and reclaim it, into whatever jurisdiction it might be taken. He could recover it in an action of replevin (Richardson v. York, 14 Me. 216; Harlan v. Harlan, 15 Pa. St. 507; Halleck v. Mixer, 16 Cal. 574); or he could maintain an action in the nature of trespass *de bonis asportatis*, for damages for its unlawful removal (Wadleigh v. Janvrin, 41 N. H. 503, 520; Bulkley v. Dolbeare, 7 Conn. 232); or he could maintain an action in the nature of trover, for damages for its conversion, if it were in fact converted; (Tyson v. McGuineas, 25 Wis. 656; Whidden v. Seelye, 40 Me. 247, 255, 256; Riley v. Boston W. P. Co., 65 Mass. (11 Cush.) 11; Nelson v. Burt, 15 Mass. 204; Forsythe v. Wells, 41 Pa. St. 291: Wright v. Guier, 9 Watts (Pa.), 172; Mooers v. Wait, 3 Wend. (N. Y.); 104) or he could maintain an action in the nature of *assumpsit*, for damages for money had and received, if the trespasser sold the property and received money therefor. Powell v. Rees, 7 Ad. & El. (Eng.) 426; Whidden v. Seelye, 40 Me. 255; Halleck v. Mixer, 16 Cal. 574. See, also, in this connection, the case of Fanson v. Linsley, 20 Kas. 235. In all cases of wrong, the tort, or a portion thereof, may be waived by the party injured, and he may recover on the remaining portion of the tort or on an implied contract, provided the remaining facts will authorize such a recovery.

Mr. Waterman, in his work on Trespass, uses the following language: "Sec. 1,102. Although as standing trees are part of the inheritance, and the severing them from it is deemed an injury to the freehold, for which trespass *quare clausum fregit* is the appropriate remedy, yet the party may waive that ground of recovery, and claim the value of the timber only thus severed and carried away. In the one case the entering and breaking of the close is the gist of the action; in the other, the taking and carrying away of the property. In the latter case the action is transitory, and not local." See, also, Nelson v. Burt, 15 Mass 204; Halleck v. Mixer, 16 Cal. 574.

The plaintiff in error, defendant below, has cited a large number of authorities, but under our code of practice and procedure they hardly apply to the facts of this case. Those nearest applicable are the following: Am. Un. Tel. Co. v. Middleton, 80 N. Y. 408; Frost v. Duncan, 19 Barb. (N. Y.) 560; Howe v. Willson, 1 Denio (N. Y.), 181; Sturgis v. Warren, 11 Vt. 433; Baker v. Howell, 6 Serg. & R. (Pa.) 476; Powell v. Smith, 2 Watts (Pa.) 126; Uttendorffer v. Saegers, 50 Cal. 496. The case of the Telegraph Company v. Middleton, *ante*, was where the defendant committed a trespass by cutting down telegraph poles in a highway and throwing them in the ditches and on the fences on the sides of the highway, and leaving them there. There was no asportation from the premises, no conversion, and no intended asportation or conversion; and the court held that the action was therefore trespass *quare clausum fregit*, and not trover, and that the action was therefore local in its character, and not transitory. The case of Frost v. Duncan, *ante*, was not decided by a court of last resort; and the main question decided was that two causes of action were improperly joined in one count. Besides, in that case, the defendants were in the actual possession of the land, claiming the same as their own under a deed. The next four cases were not decided under any reformed code of procedure, and we do not think that the seventh and last case cited conflicts with the views that we have expressed. The fact that the question of title to real estate was incidentally raised in this case makes no difference. See the cases heretofore cited, and especially Harlan v. Harlan, 15 Pa. St. 507; Halleck v. Mixer, 16 Cal. 574. The plaintiff was in possession, claiming to own the property, while the defendant was a mere wrongdoer, with no claim of interest in the land.

We have so far considered this case as though it made no difference whether the sand was severed from the real estate and carried away by one act or by two or more; nor do we think that it can make any difference. Under any circumstances, the sand remains the property of the owner of the land until he chooses to abandon the same. We suppose that if the sand were severed from the

real estate by one act, and then carried away by another, this proposition would not be questioned, and probably it will not be questioned even if the sand was severed and carried away by a single act; and if the sand remains the property of the owner of the real estate, and we think it does, there can be no good reason why he should not be entitled to all the remedies for its recovery, or for loss or damages for its injury, or detention or conversion, which he might have with respect to any other personal property.

The judgment of the court below will be affirmed.

NOTE.—1. *Local and Transitory Actions.*—Generally actions are transitory, because the wrong being personal, redress may be sought wherever the wrong-doer may be found. Wrongs that are local form an exception, and these must be brought, not only in the country, but in the very county where committed. Cooley Torts, 471. The test usually employed for determining whether local or transitory, is the one mentioned above in McGonigle v. Atchison. See also Mason v. Warner, 31 Mo. 508; Cooley Torts, 471. If the subject of the complaint is the conversion of certain property, it will not render the action local merely because incidentally a trespass upon realty was committed. For though trespass will lie for the injury done to the realty by cutting and removing trees, ores, etc., (Austin v. Huntsville, 72 Mo. 535; Hewitt v. Harvey, 46 Mo. 369); yet, trover will lie for the value of that carried away and converted: Atlantic etc. R. R. v. Freeman, 61 Mo. 81; Jones v. Hoar, 5 Pick. 290; and the subject of the action being transitory may be sued on anywhere: Cooley Torts, 471. See further as to distinction: Mastyn v. Fabrigas Cowp. 161; Rafail v. Verelst, 2 H. Bl. 1058; also as to act done in one State injuring realty in another. See Rundle v. Canal Co., 1 Wall. Jr. 275; Worster v. Lake Co., 25 N. H. 525.

2. *Tort Waived—Assumpsit — Survival.*—Although the Code has abolished forms of action, the distinction between those torts which may, and those which may not, be redressed in actions of implied *assumpsit*, continues to be important: in respect of the measure of recovery, the survival of the action after death of party, in respect of assignment, and of limitation.

"It is a principle well settled that a promise is not to be implied against or without the consent of the person to be charged by it: Whiting v. Sullivan, 7 Mass. 107. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it in consideration of some benefit received." Webster v. Drinkwater, 5 Greenl. 319; S. C., 17 Am. Dec. 239 and note. Hence it is that the right to waive a tort and sue in *assumpsit* exists only in a few cases which form exceptions to the general rule. In no case will *assumpsit* lie unless some gain has accrued to the wrong doer from which the implied promise will arise; and then only to the extent of the gain. Cooley Torts 95. Hambly v. Trott Adm. Cowp. 371. Where personal property has been tortiously taken, no implied promise will arise to pay its value, unless the wrong-doer sells, consumes or otherwise disposes of it. As long as it remains in his possession in specie, implied *assumpsit* cannot be brought by waiving the tort. Watson v. Stever, 25 Mich. 386; Birkshire v. Wolcott, 2 Allen, 227; Pike v. Wright, 29 Ala. 332; Tolan v. Hodgeboom, 38 Mich. 624; Randolph Iron Co. v. Elliott, 34 N. J. L. 184; Woodbury v. Woodbury, 47 N. H. 11 Balch v. Patten, 45 Me. 41; Moses v. Arnold, 43 Iowa, 187; Henry v. Marvin, 3 E. D. Smith, 71; Kidder v. Lowler, 44 Vt. 303. See *contra* Gordon v. Bruner, 49 Mo. 570; Tightmeyer v. Mongold, 20 Kans. 90; Hallack v. Mixer, 16 Cal. 574; Fratt v. Clark, 12 Cal. 89; Berly v. Taylor, 5 Hill, 583; Barker v. Cory, 15 Oh. 9.

Some authorities hold that nothing short of a sale by wrong-doer will give right to sue in *assumpsit*. See array of authorities cited by Cooley, Torts, p. 94. The reason the right does not extend to all acts amounting to conversion is not merely on account of pleadings and proof, but to protect substantial rights of defendant from loss by a fiction. See Bennett v. Francis, 2 B. & P. 550: Young v. Marshall, 8 Bing. 43; Webster v. Drinkwater, 17 Am. Dec. 239 and note. Where the property has been converted into money's or money's worth *assumpsit* will lie: Bradley v. Brennan, 25 Minn. 210; Isaacs v. Hermann, 49 Miss. 449; Knapp v. Hobbs, 50 N. H. 476; Osburn v. Bell, 5 Denio, 370; Fanson v. Lindsley, 20 Kans. 235; Lamine v. Dorrell, 2 Ld. Raym. 1216; Cushman v. Jewell, 7 Hun. 525.

Where the property has been absolutely used, and its form or character changed, *assumpsit* will lie. Abbott v. Blossom, 66 Barb. 353; Cummings v. Vorn, 3 Hill, 282. And so also where it has been accidentally destroyed while in his possession. Hallack v. Mixer, 16 Cal. 574; Cooper v. Berry, 21 Geo. 526; Randolph Iron Co. v. Elliott, 34 N. Y. 184. So also money wrongfully received. Note to O'Conley v. City Natchez, 40 Am. Dec. p. 87; Shaw v. Coffin, 58 Me. 258; Elwell v. Martin, 32 Vt. 217; Boston v. Dana, 1 Gray, 83; Munger v. Hess, 28 Barb. 75. So also profits received by wrong-doer from injury to real estate can be recovered in *assumpsit*. O'Conley v. City Natchez, *supra*, citing 4 Ph. Ev. C. & H.'s ed., 220, note 347. Where the chattel has been used the value of the use may be recovered in *assumpsit*. Fanson v. Linsley, 20 Kans. 238. See, also, instances given in Hambley v. Trott, Cowp. 371. Wrongfully pasturing cows on plaintiff's lands, *assumpsit* will lie. Welsh v. Bogg, 12 Mich. 42; Norden v. Jones, 33 Wis. 600. *Contra*, see Stearns v Dillingham, 22 Vt. 624; Moon v. Harvey, 50 Vt. 297; distinguish Tightmeyer v. Mongold, 20 Kans. 90. But an action for use and occupation will not lie against a trespasser; the relation of landlord and tenant is necessary. Edmonson v. Kite, 43 Mo. 176; Cohen v. Kyler, 27 Mo. 122; O'Fallon v. Boismenne, 3 Mo. 405. The value of the time of a slave may be recovered in *assumpsit*. Jones v. Buzzard, 1 Hemp. 240; Stockett v. Watkins Adm., 2 Gill. & J. 326; Ford v. Caldwell, 3 Hill (S. C.), 248. Wherever the tort may be converted into contract the claim may be used as statutory set-off. Norden v. Jones, 33 Wis. 600; Gordon v. Bruner, 49 Mo. 570. But it should be borne in mind that by waiving the tort, the recovery in *assumpsit* cannot be for the reasonable value of the chattel taken, but only for the value of the benefit or amount received; this is the limitation imposed by the form of the action. Rand v. Nesmith, 61 Me. 111; Pearsall v. Chapin, 44 Pa. St. 9; Brewer v. Sparrow, 7 B. & C. 310; Bennett v. Francis, 2 Bos. & P. 550; King v. Leith, 2 T. R. 144. The use or sale by wrongdoer must be proved as a substantive fact. Centre Turnpike Co. v. Smith, 12 Vt. 212.

An exception also is sometimes said to exist in favor of such actions against executors, etc., of deceased wrong-doers (note to Webster v. Drinkwater, *supra*), in order to save the remedy from extinguishment by death, and Humbly v. Trott, Cowp. 371, is cited as authority. But a careful reading of the case will show the reverse. The declaration alleged a conversion by the deceased; and it is clear from the remarks of the judges that had it appeared with certainty that the chattel remained in specie and had come into the hands of the administrator he would be liable for conversion for *non-feasance*, but under such circumstances *assumpsit* would lie at

all. The court, while holding that a simple tort does not survive, regarded the allegation of conversion by *deceased* as indicating a receipt of value by sale or disposal by *him*; this would give a right to charge his estate in *assumpsit*. See Bennett v. Francis, *supra*. The maxim of the common law is *actio personalis moritur cum persona*. From a misconception of this principle it was at one time doubted whether *assumpsit* would lie either for or against executors or administrators, but it is now clearly settled that it will. But it was not until the statutes of 4 Edw. 3, c. 7, and 31 Edw. 3, c. 11, that any right of action was given to the representatives of deceased person for torts done in the lifetime of deceased to his personal property. These statutes did not extend to actions *against* executors or administrators; neither did they extend to injuries done to person or real property. Hence the remedy died with the person. But the statute of 3 & 4 Wm. 4, c. 42, gave an action *to* executors for injuries done to deceased's real property in his lifetime, and also gave a remedy in trespass or case *against* his personal representative for deceased's torts in respect to real and personal property. But no right of action for injuries to person survived until Lord Campbell's Act, 9 & 10, Vic. c. 93. See on this subject: Broom Leg. Max. 904; 1 Wms. Saund. 216, note. It appears from an article published in 12 Cent. L. J. 464, that a trespass resulting in death of the injured party did exist at common law in favor of certain persons of blood, or to whom deceased was civilly bound. See Sullivan v. Union Pac. R., 3 Dillon, 334, to same effect. See also 5 South L. R. (N. S.) 325.

In some of the States the statute of 3 & 4 Wm. 4, has not been re-enacted, and in those States the distinction between those torts which can be converted into contract liabilities and those which cannot is highly important. In Missouri the matter seems to be covered by secs. 96 and 97 Rev. Stat. Mo. 1879. See Baker Adm. v. Crandall, 78 Mo. 584.

WEEKLY DIGEST OF RECENT CASES.

1. NEGLIGENCE. [*Real Property.*] — *Liability of Property-Owner for Injury from Defective Coal Hole in Sidewalk.*—A lot-owner who negligently constructs a coal-hole in the sidewalk on a street in a city, whereby a party using such sidewalk is injured, is liable for the injury thus caused. [In the opinion of the court by Beck, C. J., it is said: "The first objection to the judgment discussed by defendant's counsel is based upon the position that, if plaintiff has any remedy for the injury she sustained, it should be pursued against the city, which is alone liable. Counsel, to support this objection, rely upon City of Keokuk v. Independent Dist. of Keokuk, 53 Iowa, 352; s. c., 5 N. W. Rep. 503. In our opinion the distinction between that case and this is obvious. In that case the injury for which recovery was sought, resulted from the dangerous and defective condition of the sidewalk itself, the construction and repair of which the city, under authority assumed by ordinance, was empowered to require, in this the alleged injuries were caused, not by a defective sidewalk, but by a defective scuttle and cover, which were constructed for the private use of defendant, either with or without the authority of the city. If constructed and maintained without authority of the city, the scuttle and cover constituted a nuisance, and defendant is liable for all injuries resulting therefrom; if constructed and maintained with such authority, defendant is liable, in the absence of the care in their construction and repair required by law. See Dill. Mun. Corp. §§ 699, 1032, 1034; Com. v. Boston, 97 Mass. 555; Congreve v. Morgan, 18 N. Y. 84; and cases cited in City of Keokuk v. Independent Dist. of Keokuk, 53 Iowa, 352 (357); s. c., 5 N. W. Rep. 503. It will be observed that the petition bases the claim for recovery both on the ground the scuttle and cover were made and maintained without authority, and that they were negligently constructed. We need not inquire whether the city may be liable as well as defendant. It is sufficient for the purpose of this case to hold that defendant is liable for injuries received by plaintiff, caused by defective construction of the scuttle and cover, and that the rule of City of Keokuk v. Independent Dist. of Keokuk does not apply to the facts of this case. It may be said, in reply to the argument of defendant's counsel upon this point, that the case is that of the unauthorized or negligent use of a sidewalk, and that the cover of the scuttle cannot be regarded, as claimed by counsel, as only a part of the sidewalk. The negligent or unauthorized use of a part of the sidewalk as a cover for the scuttle rendered defendant liable for the injuries, just as he would have been liable in case he had, in a like manner, used, for his own private benefit, a part of the sidewalk for any other purpose."] *Calder v. Smalley*, S. C. Iowa, June 2, 1885; 23 N. W. Repr. 638.

2. NUISANCE. [*Bawdy House.*]—*Damages—Pleading — Action by Adjacent Property-Owner for Damages for—Defense of License under Municipal Ordinance—Loss of Rents as Damages—Pleading the Ordinance.*—A bawdy house is a public nuisance (*per se*). But how far such a nuisance is made legal by a local municipal license is another question. In a suit for damages caused by renting property for such purposes, an ordinance of the municipality licensing such houses is admissible as showing the character of the act complained of. Though such houses may be licensed, and may be, therefore, not nuisances *per se*, the business may be carried on, by indecent exposure, etc., in such a way as to become a nuisance. Whether damage accrued to adjoining property holders or not from the renting of a house for such purposes then becomes a question for the jury. Loss of rent a proper element of such damages. Where a defense is based upon a city ordinance, the ordinance should be pleaded. *Givens v. Van Studdiford*, S. C. Mo., June 8, 1885.

3. PARTIES. [*Corporation—Stockholder.*]—*Stockholder not Permitted to Defend unless Corporation Refuses.*—A corporation, and not its stockholders, is the legal owner of the corporate property. It must, therefore, defend suits brought against it in its corporate name, and a stockholder will not be permitted to do so unless it refuses, although he may own a majority of the shares. [In

the opinion of the court by Johnson, Pres., it is said: "It is well settled that, from the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real though artificial person substituted for the natural persons, who procured its creation and have pecuniary interests in it, in which all its property is invested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell and convey the corporate property and do business, sue and be sued, plead and be impleaded for corporate purposes by its corporate name. The corporation must transact its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation, only as they are within the powers and purposes of the corporation. Button v. Hoffman, 18 Wis. 606; Gray v. Portland Bank, 3 Mass. 365. This court [by Snyder, J., in Moore v. Schoppart, 22 W. Va. 291, said: 'The entire management of a corporation rests in the hands of its officers and agents. Within the scope of its charter a majority of the stockholders is supreme, and their acts are binding upon the whole. Redress for an injury to a corporation should be obtained, if possible, by the corporation itself through its regularly appointed agents; and it is only when the corporation is disabled from proceeding on its own behalf by reason of the misconduct or failure of its officers and agents to discharge their duties, that the stockholders may themselves proceed in chancery for the protection of their equitable rights.' If, in a cause like this, the corporation refused to appear and defend itself against the claim, a stockholder might under the discretion of the court be permitted to do so. Bronson v. LaCrosse R. Co., 2 Wall. 302; Dodge v. Woolsey, 18 How. 331. A conveyance of all the capital stock of a corporation to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. Wilde v. Jenkins, 4 Paige, 481. In Winona, etc. R. Co. v. St. Paul, etc. R. Co., 23 Minn. 359, which was brought to restrain the defendant from applying for or receiving from the Governor of the State any deed or conveyance of certain lands described in the complaint and praying, that the plaintiff might be adjudged to be the owner of the lands, it was held, that it was "no defense to such an action, that another party has become the owner of the sole beneficial interest in the rights, property and immunities of the corporation; and an averment of that character in the answer may properly be stricken out on motion as immaterial and irrelevant."] *Park v. Petroleum Co.*, 25 W. Va., 108 (adv. sheets).

4. PAYMENT. [*Check.*] — *Payment by Banker's Check, Afterwards Dishonored is no Payment.*— To pay for a bill of goods, the buyer sent to the seller a check, drawn by one bank upon another, indorsed by the buyer to whose order the check was payable, and the seller on receiving it, sent back to the buyer a receipt acknowledging payment of the bill. At the time of sending the check by the buyer, and the receipt by the seller, it was supposed by the buyer and seller that it was good, but in fact there were no funds of the drawer in the hands of the drawee subject to the payment of the check at the time it was drawn or afterwards. *Held*, that in an action on an account for goods sold and delivered, a plea of payment cannot be maintained on the facts above stated. *Fleig v. Sleet*, S. C. Ohio, March 10, 1885; 13 Weekly Law Bull. 327.

5. PRACTICE. [*Bill of Exceptions.*]—*Good when Signed at a Subsequent Term without Continuance.*—Where the trial court holds a motion for new trial under advisement for several terms, without regularly continuing the cause from term to term. All matters of exception are considered as still being in the breast of the judge, and no bill of exceptions need be filed until the motion is finally determined. *Givens v. Van Studdiford.* S. C. Mo., June 8, 1885.

6. RES ADJUDICATA. [*Corporation — Injunction— Quo Warranto.*]—*Decree in Favor of Corporation in Suit for Injunction, when Conclusive in its Favor in Subsequent Proceedings by Quo Warranto.* —Where the attorney general, on behalf of the people, filed an information in chancery against two railway companies, to restrain such companies from building and operating their road within a city, etc., alleging various grounds for the relief sought, which bill, on a hearing after answer, was dismissed, the court in its decree finding in favor of the rights claimed by the railway companies, it was *held*, that such decree was conclusive upon the people on an application in behalf of the people to file an information in the nature of a *quo warranto*, seeking to call in question the right of one of the same companies to exercise the same franchises and perform the same acts as were attempted to be enjoined in the prior suit. In the opinion of the court by Mr. Justice Scholfield it is said: ["Had affirmative relief been granted on the information, it undoubtedly might have been on any one of the specific grounds alleged in the information, and thus have confined the question actually decided, to that one specific ground; but the court having denied all relief, it must follow that each specific ground alleged in the information was considered and held insufficient. This, of course, assumes, *in limine*, that the court had jurisdiction of the subject matter as well as of the parties, for this, in all cases, is essential to a valid adjudication. On that point we entertain no doubt. The general doctrine that a cause of forfeiture cannot be taken advantage of or enforced against a corporation, collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose, against the corporation, is conceded. But the present case is different. Here, the objection to the corporate existence of the respondent, if good at all, shows an absolute death of it on the day of the adoption of the present Constitution, and not merely the existence, from and after that date, of cause of forfeiture,—and in such cases injunction will lie to enjoin threatened acts by those assuming to act in behalf and in the name of the dead corporation. Casey v. R. Co., 5 Iowa, 357; *In re* B., W. & N. R. R. Co., 72 N. Y. 245; Brooklyn Steam Trans. Co. v. Brooklyn, 78 Id. 524; C., L. and B. Co. v. Commonwealth, 100 Pa. St. 438; Coal Co. v. R. Co., 4 G. & J. 1; Greely v. Smith, 3 Story, 657; R. Co. v. R. Co., 36 Conn. 196; R. Co. v. R. Co., 45 Cal. 365. And the doctrine has been frequently recognized and enforced by this court, that where a valid corporation assumes to exercise licenses or powers by virtue of invalid ordinances of a municipal corporation, or in excess of authority legally conferred upon it, a court of equity, upon a proper showing, has jurisdiction to interfere and restrain it. There being jurisdiction, and the court having, in order to arrive at the decision evidenced by its decree, to

necessarily pass upon every question at law raised by this petition, its decisions therein are conclusive in the present case. This question was fully considered by this court in Hanna v. Read, 102 Ill. 596, and again in Tilley v. Bridges, 105 Id. 336. In the first named case there had been a decree of the circuit court of Vigo County, Indiana, between the same parties in interest—although the nominal parties were different—declaring that Ezra B. Read, at the time he executed certain deeds, was insane, and that the deeds were therefore invalid. The bill in that case was filed in the circuit court of Cook county, to set aside one of those deeds on the ground of Read's insanity, and it was held the adjudication of that question by the Vigo, Indiana, circuit court, was binding and conclusive upon the Cook circuit court. The property in litigation in the two different courts was not the same, but the deeds to the property in Indiana and in this State were executed in the same transaction, and as nearly at the same time as was possible. Among other things, we then said: 'Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. * * * * Whether the adjudication relied on as an estoppel goes to a single question or all the questions involved in a cause, the fundamental principle upon which it is allowed, in either case, is, that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of setting aside such adjudication.' This doctrine is limited to matters necessarily involved in the litigation, but it is equally applicable whether the point was, itself, the ultimate vital point, or only incidental, but still necessary to the decision of that point. Bigelow on Estoppel (1st ed.), 95; Id. (2d ed.) 36; Freeman on Judgments, §§ 254, 255, 260; Demarest v. Darg, 32 N. Y. 281."] *Attorney-General v. Chicago & Evanston R. Co.*, 112 Ill. 520, 537 (adv. sheets).

7. RES JUDICATA.—[*Judgment by Default*]—*When a Bar in an Action to Prevent Diversion of Water.*—A judgment by default in favor of a plaintiff, in an action to prevent the defendant from diverting and using the waters conducted from a certain stream by the plaintiff's ditch, and to protect the plaintiff in the use of such water, thus diverted, for the purpose of irrigation, is a bar to a subsequent action by such defendant against such plaintiff, to restrain him from diverting the waters of such stream by means of the said ditch, for the uses of irrigation, and to protect the former in the use of such water as the riparian proprietor. [In the opinion of the court, after pointing out that the gist of the action in each case, was the right to the water in Bear Creek, Lord, J., speaking for the court, says: "The rule is well settled that "a party cannot litigate matters which he might have interposed, but failed to do in a prior action between the same parties or their privies, in reference to the same subject matter;" Wells on *Res Adjudicata*, § 251, citing Hackworth v. Zollers, 30 Iowa, 433; Hites v. Irving, 13 Ohio St. 283; Le Guen v. Guvenuer, 1 Johns. Cases, 435; Gray v. Dougherty, 25 Cal. 266. In some of the cases the rule has been carried to the extent of declaring that 'if a party fails to plead a fact he might have plead, or fails to prove a fact he might have proved, the law can afford him no relief:' Wells on *Res Adjudicata*, § 251; Bell v. McCulloch, 31 Ohio St. 399; Ewing v. McNary, 20 Ohio St. 322; Embury v. Conner, 3 Comst. 511; Covington etc. v. Sergeant, 27 Ohio St. 227; LeGuen v. Guveneur, *supra*. In other cases it is said that the test is, to determine whether the matter, which is claimed to be barred, might have been litigated under the pleadings: Columbus and S. R. R. Co. v. Watson, 26 Ind. 52; Duncan v. Holcomb, Id. 378; Sheets v. Selden, 7 Wall. 416; Belost v. Morgan, 7 Wall. 619; Henderson v. Henderson, 3 Hare, Ch. 115. The finality of judgments rests upon the maxim, '*interest reipublicæ ut sit finis litum.*' 'It is for the public good,' says Mr. Brown, 'that there be an end of litigation, and if there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatum*, and the judgment remains therein in full force and unreversed, the original cause of action is merged and gone forever:' Broom's Legal Maxim. 'It is not only final," says Radcliffe, J., 'as to the matter actually determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. The reasons in favor of this extent of the rule, appear to me satisfactory; they are found in the expediency and propriety of silencing the contention of the parties, and of accomplishing the ends of justice by a single and speedy decision of all their right. It is evidently proper to prescribe some period to controversies of this sort, and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all their claims. This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and oppressive; it might tend to unsettle the determinations of law and open a door for infinite vexation.' Nor is the principle of the rule affected that the judgment was obtained by default. 'The rule,' says Mr. Freeman, 'that a judgment is conclusive of every fact necessary to uphold it, admits of no exception; and is equally applicable whether the final adjudication resulted from the most tedious and stubborn litigation, or from a suit in which no obstacle was possible to delay or defeat plaintiff's recovery. A judgment by default is attended with the same legal consequences as if there had been a verdict for the plaintiff. There exists no solid distinction between a title confessed and one tried and determined:" Freeman on Judgments, and note. 'So the neglect of a defendant to answer, and a decree *pro confesso*, are equivalent to an admission of the allegations of the bill as to all parties against whom such a decree passes:" 6 Wait's Actions and Defenses, 771; Brumagim v. Ambrose, 48 Cal. 368. 'The judgment is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to, or essentially connected with the subject matter of the litigation, within the purview of the original action, either as a matter of claim or defense:'

Miller, J., in Jordan v. Van Epps, 85 N. Y. 43; see also, Barrett v. Failing, 8 Ore. 152; Bloomer v. Sturgis, 58 N. Y. 168; Embrey v. Conner, 3 N. Y. 512. Nor is it any objection that 'the former suit embraced more subjects of controversy, or more matter than the present; if the entire subject of the present controversy was embraced in it, is *res judicata*. No man is to be twice vexed with the same controversy. Biglow v. Windsor, 1 Gray, 302; Trago R. R. v. Blossburg R. R., 20 Wall. 137.]" *Neil v. Folman*, S. C. Ore., May 19, 1885; 6 West Coast Repr. 679.

8. SET-OFF.— [*Action against State*]—*Claim for Same against State in Suit against Tax Collector Denied.*—A tax collector is not entitled to deduct, from amount due by him for taxes collected for the State, the cost of deeds on purchase of lands sold for taxes and bought by the State, in the absence of a statute permitting such deduction; such set-off being reconventional in its character, and not pleadable against the States. *State v. Bradley*, S. C. La., Monroe, June, 1885.

9. SPECIFIC PERFORMANCE—*Not Granted to Compel the Assignment of a Lease, where the Consent of the Lessor is a Prerequisite to the Right.*—A court of equity will not decree the specific performance of a contract to assign a lease for a term of years, where the lease requires the lessor to erect a building on the premises of not less value than a given sum, and prohibits its assignment except by the written consent of the lessor, where the lessor has failed to give such assent, and has put it out of his power to do so by accepting a surrender of the lease and the execution of a new one to other parties. [In the opinion of the court by Mr. Justice Dickey, the following language occurs: "In Fry on Specific Performance, § 536, it is said: 'The court will not compel specific performance of a contract unless it can execute the whole contract.' In 3 Parsons on Contracts, (7th ed.) 362, the author says: 'If one promising to sell land has no title to it, and the buyer knows this, and the seller is unable afterwards to acquire title, a decree (for specific performance) will not be granted,'—citing Love v. Cobb, 63 N. C. 324. Again, on page 361, he says: 'A vendor will not be ordered to make a sale of a thing, or give a deed of land, when he has no legal title,'—citing Malden v. Fyson, 9 Beav. 347. In 3 Pomeroy's Eq. Jur., § 1405, the author says 'The contract must be such that its specific enforcement would not be nugatory. * * * Although the contract, by itself, can be specifically enforced, the defendant must also have the capacity and ability to perform it, by obeying the decree of the court. * * * Finally, the contract must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its own decree when made."] *Hurlbut v. Kantzler*, 112 Ill. 482 (Adv. Sheets).

10. STATUTES [*Interpretation*]—*When the Word "May" is to Read "Shall."*—The word "may" in a statute, means "shall" whenever the rights of the public or third persons depend upon the exercise of the power, or the performance of the duty to which it refers. The word has such meaning in the proviso of § 90 of the Practice act, which reads as follows: "Any party to such cause shall be permitted to remove the same to the Supreme Court by appeal or writ of error, in the same manner as provided in §§ 67, and 70, of this act for appeals to said Appellate Court: Provided, that such appeal may be prayed for at any time within twenty days after the rendition of such judgment, order or decree, whether such Appellate Court be in session or not; and if such appeal be prayed for in vacation, any one or more judges of such Appellate Court may make and sign all orders necessary for the perfecting of such appeal." The court cite: Kane v. Footh, 70 Ill. 587; Fowler v. Pirkins, 77 Id. 271] *James v. Dexter*, 112 Ill. 489 (Adv. Sheets.)

11. ——. ——. *When the Word "or" is Read so as to Mean "and."*—The word "or" in a statute will be construed to mean "and" when the sense of the statute requires it. [Citing State v. Brandt, 41 Iowa, 615; Boyles v. McMurphy, 55 Ill. 236; Weston v. Loyhed, 30 Minn. 226; S. C., 14 N. W. Rep. 892.] *Kanne v. Minneapolis, etc. R. Co.*, S. C. Minn., June 5, 1885; 23 N. W. Repr. 854.

12. TAX TITLES. [*Adverse Possession*]—*Effect of Quit claim Deed of Tax Title Claimant to Original Owner.*—The execution of a quitclaim deed by a tax-title claimant to the original owner of land sold for taxes, that had not been occupied by any one for three years after the date of the recording of the tax deed, within three years of the recording thereof, *held* to operate as an abandonment and surrender to said original owner of the constructive adverse possession which arose in his favor by virtue of his taking such tax deed and recording it, which constructive adverse possession set the statute of limitations running in his favor, and that after such constructive adverse possession ceased, the statute of limitations ceased to run in favor of his title, and thereafter it ran in favor of the original owner, and barred any right of action in favor of those claiming under the tax deed after the expiration of the three years from the recording thereof. [In the opinion of the court by Taylor, J., it is said: "This court has repeatedly decided: 1. That if the tax-title claimant has been in the actual adverse possession of the lands described in the tax deed for three years next after the recording of the tax deed, the right of the original owner to show any irregularities in the tax proceeding is absolutely barred, even though the tax deed may be void upon its face. 2. That if such actual possession has been interrupted by any one claiming under the former owner during said three years, then the statute does not bar such owner's right, but, on the contrary, the statute runs in favor of the original owner; and unless the person claiming under the tax deed brings his action within the three years he is barred from maintaining any action to assert his rights under said deed. Lewis v. Disher, 32 Wis. 504; Gunnison v. Hoehne, 18 Wis. 268; Lawrence v. Kenney, 32 Wis. 281–293; Jones v. Collins, 16 Wis. 594: Dean v. Earley, 15 Wis. 100; Lain v. Shepardson, 18 Wis. 59; Cutler v. Hurlbut, 29 Wis. 152; Wilson v. Henry, 35 Wis. 241; Haseltine v. Mosher, 51 Wis. 443; S. C., 8 N. W. Rep. 273. 3. That when the tax deed is in due form and recorded in the proper office, and the lands described therein remain vacant and unoccupied for three years or more after the recording thereof, the tax-title claimant is deemed to be in the constructive adverse possession, and the statute runs in his favor, and the original owner is barred from attacking its validity. Austin v. Holt, 32 Wis. 478; Lawrence v. Kenney, Id. 281. 4. The bar of the statute is held to run in favor of the tax claimant in the case last stated, upon the presumption of fact that the recorded tax deed creates a constructive adverse possession in favor of the tax claimant, which, if continued for the three years, is as effectual to bar the orig-

inal owner as an actual adverse possession for the same length of time. It is held by this court that this constructive adverse possession is based upon the presumed claim made by the grantee in the tax deed to the premises described therein, evidenced by his taking such deed and placing the same upon record, as against the original owner, not having any actual possession; and it is also held that such constructive adverse possession is at once interrupted and destroyed by an actual possession taken within the three years by the original owner, or by any one claiming under him; and it seems equally clear that any act on the part of the tax-title claimant which is inconsistent with his supposed adverse constructive possession, would also interrupt and destroy the same. If he releases his claim during the three years to the original owner, such release interrupts his constructive adverse possession, and from the date of such release the statute ceases to run in his favor. Having, in fact, abandoned his constructive adverse possession within the three years by such release, he can no more transfer to his grantee the right to set up such constructive adverse possession as a bar to the right of the original owner, than he could if he had released and surrendered an actual adverse possession to such owner during said three years. The nature of this constructive adverse possession of the tax claimant when the lands are vacant, which causes the statute of limitations to run in favor of such claimant, was considered in the case of Lewis v. Disher, 32 Wis. 504–507. In that case Chief Justice Dixon says: "The constructive possession of unoccupied land, which follows the tax deed and vests in the grantee, is, for all the purposes of the statute of limitations, and of becoming conclusive evidence of title under it, of the same nature, and operates in the same way and with the same force, as an actual adverse possession for the same period of time, where a possession of the latter kind is taken, and relied upon as a bar under the statute. The constructive possession is in this respect of the same nature, and the force and effect of it is the same, as the twenty-years, adverse possession without color of title, or the ten-years with, under the other statutes limiting the time within which actions for the recovery of real estate must be brought. The constructive possession is an adverse possession, and the nature of such a possession, or what it must be when it is actual, is well understood and defined in the law. It is well settled that an actual adverse possession, to be available as against the true owner, and to operate to bar his rights, and to transfer the title to the adverse claimant, must have been continuous and uninterrupted during the period of limitation prescribed, and that any cessation of such possession, or pause or intermission in it, or any re-entry and actual and peaceable occupation and holding by the true owner, before the period of limitation has expired, will restore such owner to his original right, and defeat the prescription of the adverse claimant, or postpone it so that he can thenceforth only assert or hold, by virtue of it, from the time his adverse possession is renewed, and shall be thereafter continuously maintained and held. This doctrine was examined and fully recognized by this court in Sydnor v. Palmer, 29 Wis. 226. See, also, Haag v. Delorme, 30 Wis. 591. And so strict is the rule that it has been held if the adverse possession be broken but for a day, its effect is entirely destroyed, and, so far as that possession is concerned, it is at an end. And in some cases the interruptions of simple trespassers, when quite decided and indicative of claim, have been declared to be sufficient to break the continuity and defeat the adverse possession. Tyler, Ej. & Adv. Enj., c. 51, pp. 907, 910, 911, and authorities cited. There is no reason why the rules thus established, with respect to an actual adverse possession and enjoyment, should not always apply to and govern an adverse possession which is constructive. We think they do apply and govern, and that the constructive possession of unoccupied land, to be effective as conclusive evidence of title in favor of the grantee in the tax deed, and to bind and conclude the former owner, must be continuous from the date of the recording of the tax deed, to the full end and expiration of the three years prescribed by the statute." I have made this extended quotation from the opinion of the learned chief justice, for the reason that I consider it conclusive upon the point raised in the case at bar. It is clear from the opinion above cited, that if the tax-title claimant had taken actual adverse possession under his deed, and during the running of the three years, and while in such actual possession he had acknowledged the right of the original owner, and consented to hold the possession in the future subordinate to the title of such original owner, the statute would cease to run in favor of the tax deed; and if, after so acknowledging the right of the original owner, and holding subordinate to his title, he conveyed his title to a third person who had no knowledge of such arrangement, such grantee would not be in any better position in regard to his title, so far as adverse possession and the statute of limitations is concerned, than his grantor; and, according to the reasoning in the case above cited, the constructive adverse possession which sets the statute running and keeps it running in favor of the tax deed, being of the same nature as an actual adverse possession, it can be interrupted in the same way by an abandonment thereof by the grantee in the deed, or by surrendering such constructive adverse possession to the original owner. And the fact that such surrender or abandonment is not made known to his grantee does not in any way affect the running or not running of the statute in his favor. See Knox v. Cleveland, 13 Wis. 245–252. For the purposes of this case it may be admitted that the release of the tax claimant to the original owner, not having been recorded, would not affect the title of the grantee of the tax claimant who purchased without notice; but the only title he would get in such case would be the title actually conveyed by the tax deed. If his grantor's title has been barred by the statute of limitations having run against it, and in favor of the original owner, his right under the deed would also be barred; and if the statute of limitations has run in favor of the tax deed he would take the title perfected by such limitation. The registry act has nothing to do with the question of title which is acquired or lost by adverse possession. A title so acquired or lost depends wholly upon the acts of the parties not appearing upon the records, and not protected or affected thereby; and a grantee, who claims that his grantor's title has been perfected by such adverse possession, must establish such adverse possession by the same proofs that would be required of his grantor, and his claim would be defeated by the same proofs that would defeat his grantor. Upon this question the registry acts neither make for or against his claim of title." *Warren v. Putnam*, S. C. Wis., June 1 1885; 24 N. W. Repr. 58.

13. TRADEMARK. [*Injunction.*]—*Use of Name of a Place by a Subsequent Owner of the Place not Enjoined.*—A person used the words "Tower Palace" to designate the place or store where he did business, and not the kind of business he did. It is *held* that the words did not constitute a trademark, and he having moved could not enjoin the owner of the building or a subsequent tenant from continuing to designate the house as "Tower Palace." [Compare Howard v. Henriques, 3 Sandf. Ch. 725; Booth v. Jarrett, 52 How. Pr. 149; Pepper v. Labrot, 8 Fed. Repr. 29; s. c., 3 Ky. Law Repr. 126; Woodward v. Lazar, 21 Cal. 448.] *Armstrong v. Kleinhaus*, Ky. Ct. of App., Oct. 28, 1884; 6 Ky. Law Repr. 561.

14. TRESPASS UPON LAND. [*Title.*]—*Plaintiff must Show Title where Injury is to Freehold.*—In an action on the case for negligence on the part of a boom company, causing, as alleged, the absolute destruction, by washing away, of a rod or more of plaintiff's land, he must prove title to the land, and a quitclaim deed from a party not shown to have been in possession at the time of its execution will not be sufficient. [In the opinion of the court, Champlin, J., said: "This was an injury to the freehold, and no one but the owner of the inheritance could recover for its destruction. George v. Fisk, 32 N. H. 32; Van Deusen v. Young, 29 N. Y. 9; Davis v. Nash, 32 Me. 411; Curtiss v. Hoyt, 19 Conn. 159; Hosking v. Phillips, 3 Exch. 168; Moyer v. Scott, 30 Mich. 345."] *Anderson v. Thunder Bay Boom Co.*, S. C. Mich., June 10, 1885; 23 N. W. Repr. 776.

15. TRUSTS. [*Parol Evidence.*]—*Express Trusts in Lands Provable by Parol.*—In Ohio, it is competent to prove an express trust in respect of lands by parol. [In the opinion of the court so holding, Dickman, J., said: "Previous to the enactment of the statute of frauds of this State, a trust might be created in real estate by parol and established by parol evidence, and there is nothing in our statute which prevents the establishment of an express trust in lands by evidence of the same kind. By the 7th section of the English statute of frauds, it is required that all declarations or creations of trusts of lands shall be manifested and proved by some writing, signed by the party who is by law enabled to declare the trust. But this section and the 8th and 9th sections of that statute, in relation to trusts, are omitted from our statute, and express trusts are allowed to be proved by parol evidence, as well as resulting trusts which arise by operation of law, and are unaffected by the statute. Fleming v. Donahoe, 5 Ohio, 225; Broadup v. Woodman, 27 Ohio St. 553; Matthews v. Leaman, 24 Ohio St. 615. While the evidence should be clear, certain and conclusive in proof, not only of the existence of the express trust at the time of the conveyance, but also of its terms and conditions, the trust may be engrafted by parol evidence upon a conveyance of real estate absolute on its face. Miller v. Stokely, 5 Ohio St. 194; Stall v. Cincinnati, 16 Ohio St. 169. Nor is this rule contravened by the 4th section of our statute, which refers to the assigning or granting of legal interests; nor by the 5th section, which prevents the bringing of any action to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them. And as said by the court in Fleming v. Donahoe, *supra*, the creation of the trust in lands by parol, is not to be considered as varying the terms of the deed, but only as setting up an independent contract consistent with it."] *Harvey v. Gardner*, Ohio Sup. Ct. Com., Jan. 13, 1885; 13 Weekly Law Bull. 309.

16. ———. [*Declaration.*] — *May be Proved by Contemporaneous Declarations of Trustor.*— H, "for one dollar and other valuable consideration," by an instrument not under seal and absolute on its face, transferred to his three sons all his "right and title in" certain mineral lands, of which the legal title was in another. An iron company was thereafter organized under the laws of this State, a large part of the capital stock of which was subscribed by those holding interests in the lands, and the lands were all conveyed to the company and accepted by it in full payment of the stock subscriptions. The certificates of the stock subscribed by two of the sons in their own names, were issued, at their instance and request, to their respective wives, and the two sons—partners in business—subsequently assigned their partnership and individual property in trust for the benefit of their creditors. In an action by the assignees to declare such certificates of stock fraudulent and void, as against the creditors, it was *held*, that declarations of H at the time he transferred to his sons his right and title in the mineral lands, were admissible in evidence, for the purpose of proving that such transfer was made to his sons in trust, for the use and benefit of their respective wives. *Ibid.*

17. ———. [*Acceptance—Presumption.*]—*Acceptance of Trust, when Presumed.*—The acceptance of an express parol trust engrafted upon an absolute grant of an interest in land, may be presumed from acts of the grantee at, or subsequent to the time of the grant. *Ibid.*

JETSAM AND FLOTSAM.

MIXED MARRIAGES.—There is a probability that the distressed heroine whose woes arise out of the fact that, being an Englishwoman, she marries a Frenchman, without any knowledge of the French marriage laws, will soon become out of date. Lord Granville recently replied to a letter on the subject from the Bishop of Manchester, to the effect that the Foreign Offices of London and Paris had agreed upon a form of certificate which should be issued by the French Consuls, throughout the United Kingdom, before the celebration of marriages between French and English subjects. There can be no question about the value of such a document, setting forth that the requirements of the French code have been complied with to the satisfaction of the Consul issuing it. But it would be still better if it were known that such a certificate would be received in any French Court of Law as in itself constituting indisputable proof that an English marriage had been performed in strict accordance with French Law. Having addressed an inquiry to the French Consulate on this point, we are politely informed by M. Cochelet, the Vice-Consul, that "the instructions received from the Foreign Office in Paris are silent on the subject." It should be added, indeed, that in a letter from M. Napoleon Argles, the Solicitor to the Consulate, which was published a few weeks ago, that gentleman declares that when the Consular certificate has been obtained, the marriage "can be proceeded with, without risk of being annulled." This, of course, would be the natural assumption, from the formal nature of the document; but it would be more satisfactory if the inference of M. Argles were corroborated by an express declaration from the French Foreign Office.—*Pump Court.*